STATE OF MICHIGAN

COURT OF APPEALS

KURT LOCKWOOD, as personal representative of the ESTATE OF JERRI LOCKWOOD, Plaintiff-Appellee, v MOBILE MEDICAL RESPONSE, INC., Defendant-Appellant.	FOR PUBLICATION June 7, 2011 No. 295931 Saginaw Circuit Court LC No. 09-006260-NO Advance Sheets Version

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. (*dissenting*).

I respectfully dissent. The majority in this matter has very well-founded and appropriate concerns, both with regard to the ultimate merits of this case and with regard to the policy implications involved. I wholeheartedly agree that the trier of fact will require expert testimony in order to understand any judgment exercised by defendant in getting its ambulance from its assigned station to the scene of the decedent's collapse. But I cannot comprehend how the majority concludes that the trier of fact will require expert *medical* testimony to do so.[1]

I agree with the majority's recitation of the test for whether a claim sounds in medical malpractice. There are two "defining characteristics" of medical-malpractice claims: the breach

[1] Plaintiff will likely need expert medical testimony to show cause-in-fact, i.e., whether the decedent would have survived if she had received more prompt care. Medical responders were *already* on the scene well before defendant's ambulance arrived, so it is doubtful that plaintiff could do so. But under the present procedural posture of this case, that issue is not before us, and the gravamen of a medical-malpractice claim is the need for expert medical testimony to explain the allegedly breached standard of care, not causation. If, in fact, plaintiff attempts to introduce expert medical testimony for anything other than causation, the trial court should not allow this into evidence. But this matter is before us on a motion for summary disposition pursuant to MCR 2.116(C)(8), so we are required to believe what plaintiff argued below: that there would be no expert medical testimony because there is no need to exercise medical judgment in driving an ambulance carefully.

occurred within a "professional relationship" and "the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). I take no issue with the majority's conclusion that a professional relationship existed here. Furthermore, I agree that this claim raises questions of *some* kind of "judgment beyond the realm of common knowledge and experience." As such, *some* kind of expert testimony certainly will be required.[2] I cannot glean from the pleadings or the record any support for the conclusion that this claim raises questions of *medical* judgment.

In *Bryant*, our Supreme Court discussed whether various of the plaintiff's claims sounded in medical malpractice or ordinary negligence; it found one claim completely unrecognized by Michigan law, two claims to sound in medical malpractice, and one claim to sound in ordinary negligence. The two medical-malpractice claims were found to sound in medical malpractice because training staff to evaluate a patient's risk of asphyxia and checking facilities for a risk of asphyxia required specialized and complex knowledge of the pros and cons that varied from person to person under various circumstances. *Bryant*, 471 Mich at 426-430. In contrast, the claim that was found to sound in ordinary negligence entailed the defendant's receiving definite information that a specific patient was actually at risk, whereupon the defendant literally did nothing at all about it; no professional judgment was necessary for the fact-finder to determine that the defendant should have done *something*. *Id*. at 430-432.

Here, I believe that it is well within the realm of common knowledge and experience that the response time to a cardiac arrest is critical. No professional judgment of any kind is needed to deduce that it was incumbent on defendant to get to the decedent as quickly as possible. What is *not* within the realm of common knowledge and experience is whether *it actually was possible* for defendant's ambulance to get to the decedent any faster. In the real world, there are a multitude of considerations facing the driver of an emergency vehicle. Are there, for example, automatic traffic-signal-changing devices in the locality? How quickly does other traffic on the road really yield to emergency vehicles? In the absence of expert testimony on the topic of safe and competent operation of heavy emergency vehicles, it would invite chaos to leave the trier of fact to speculate with regard to whether defendant's driver should have, for example, gone through a red light or taken a corner faster.[3]

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[2] It would therefore be a false dichotomy to suggest that this claim must require *either* medical judgment *or* lay knowledge.

[3] Plaintiff asserts that defendant's tardiness "also violated the protocol, guidelines, and procedures dealing with dispatching and responding to emergency medical transportation calls," a reference to the provider agency standards issued by the Saginaw Valley Medical Control Authority. Such guidelines may be relevant to a determination of the applicable standard of care, although they do not per se establish it. See *Jilek v Stockson*, 289 Mich App 291, 306-310, 314; 796 NW2d 267 (2010). They *might* require a medical expert to interpret and explain them. But the only relevant portion of the provider agency standards here is that at least 90 percent of

But those judgments facing defendant *were not medical in nature*.[4] It would already have been established, and indeed obvious, that defendant's driver needed to get to the destination as quickly as possible. The issue is whether defendant's driver *did* get the ambulance to the decedent as quickly as possible, and so any judgments he or she exercised in the process pertain to such issues as driving skills, proper use of whatever emergency-signaling or traffic-control devices the ambulance had available, and, to be sure, professional judgments regarding whether an ambulance could safely execute maneuvers under the weather or traffic conditions then facing it. While these judgments are outside the common knowledge of jurors, they are simply not medical in nature.

According to the majority's reasoning, if a doctor who was on-call at a hospital chose to purchase a four-cylinder family car instead of an eight-cylinder sportscar or sport-utility vehicle, and was therefore not capable of getting from his or her home to the hospital as quickly or through the same road conditions in an emergency, the doctor's *decision to buy a particular model car* would potentially constitute medical malpractice. Likewise, an insurance company's delay in processing a claim, which can have serious consequences to an insured's ability to obtain medical care, could constitute medical malpractice. Alternatively, perhaps the majority intends to create a new legal rule that any matter involving an ambulance involves medical malpractice *per se*. Either way, I simply cannot agree that a decision that might have some ultimate medical consequences necessarily constitutes an exercise of actual medical judgment.

I would affirm.

/s/ Amy Ronayne Krause

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responses to life-threatening emergencies must be within 8 minutes and 59 seconds, which defendant satisfied. I see no reason why a lay juror would require expert medical testimony to understand this requirement or explain whether defendant acted reasonably in light of it.

[4] This is, of course, not to say that a claim involving the responsiveness of an ambulance operator to a reported medical emergency can never be a medical-malpractice claim. For example, if defendant had received multiple simultaneous emergency reports and had to decide the order in which to respond by evaluating the reports' comparative abilities to absorb a delay. Or if the ambulance crew were engaged in some other activity at the time of the dispatch—from purchasing coffee to actively treating another client—and had to decide whether they had time to finish before responding. In other words, there could certainly be situations in which an ambulance operator will need to exercise some kind of medical judgment. But none was alleged here.